Citation: *ML v Canada Employment Insurance Commission*, 2022 SST 867

# Social Security Tribunal of Canada
## General Division – Employment Insurance Section

# Decision

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| **Appellant:** | M. L. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (449210) dated January 20, 2022 (issued by Service Canada) |

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| **Tribunal member:** | Raelene R. Thomas |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | March 23, 2022 |
| **Hearing participant:** | Appellant |
| **Decision date:** | April 6, 2022 |
| **File number:** | GE-22-520 |

## Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] With respect to the issue of voluntarily leaving employment, the Commission has not met its burden to show the Claimant had the choice to stay in or to leave her job.

[3] The Claimant has shown that she was and is available for work. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to benefits.

## Overview

[4] The Claimant was working part-time at a long term care facility (LTCF) while attending school full-time to complete a degree in the healthcare field. In response to the COVID 19 pandemic the provincial government brought in a rule that employees could not work in two healthcare facilities at the same time. The Claimant's program required that she participate in one clinical day each week in a hospital. The Claimant discussed the situation with her employer. She thought she had to resign, but her manager offered her a leave of absence and she would return once her semester ended. When the Claimant went to return to work the employer was not aware of the leave of absence and offered her a different job which she did not accept.

[5] The Canada Employment Insurance Commission (Commission) looked at the Claimant's reasons for leaving. It disqualified her from receiving EI benefits because it decided that she voluntarily left (or chose to quit) her job without just cause, so it wasn't able to pay her EI benefits.

[6] I have to decide whether the Claimant has proven that she had no reasonable alternative to leaving her job when she did.

[7] The Canada Employment Insurance Commission (Commission) also decided that that the Claimant was disentitled from receiving EI regular benefits from March 8, 2021 to April 30, 2021 and from September 7, 2021 onward because she was taking a

training course on her own initiative and had not proven her availability for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[8] I have to decide whether the Claimant has proven that she was available for work. The Claimant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

## Issues

[9] Is the Claimant disqualified from receiving EI benefits because she voluntarily left her job without just cause?

[10] Was the Claimant available for work while in college?

## Analysis ~ Voluntary Leaving

[11] I have to decide if, under the *Employment Insurance Act,* the Claimant had just cause to voluntarily leave her employment. This decision takes two steps. First, I have to see if the Claimant chose to leave her job. Second, I have to see if the Claimant had just cause for leaving her job.

[12] I find that the Claimant did not voluntarily leave her job. She did not have a choice to stay in or to leave her job.

[13] The Commission decided that the Claimant left her job on December 31, 2020, without just cause. It says that she was enrolled in a training program that included a hospital learning component. The COVID 19 policies in place at that time prevented an employee from working in more than one healthcare facility. The Claimant handed in her notice to quit but her employer offered to put her on a leave of absence until the spring. When she was due to return the employer offered her a night shift that she refused.

[14] The Claimant says that she took a leave of absence from her job. She testified that she was working part-time at the LTCF while she was enrolled full-time in college. Her college program contained a clinical component that required her to be present in a

hospital for one day each week. The provincial government enacted a regulation preventing employees from working in two healthcare facilities at the same time.

[15] The Claimant testified she told her manager she needed to resign to continue her schooling. The Claimant discussed the situation with her manager who offered the Claimant a leave of absence. There was no set date of return but they did agree that once school was over the Claimant was to message the manager with her availability and she would return to work once the semester was ended.

[16] The Claimant testified that she was working on the weekends at the LTFC as a personal support worker (PSW). She would work Friday, Saturday and Sunday. As a PSW she would be more room based providing hands on support to the residents. She would do housekeeping in the rooms and serve meals.

[17] The Claimant went to college full-time for the winter 2021 semester. She went back to her employer in the spring. The LTCF had been sold to new owners and her former manager no longer worked there. When the Claimant approached the new owners they did not know who she was and they did not know she was on a leave of absence. The Claimant testified that she was offered straight midnight shifts working in the laundry. She would be working in the basement of the LTCF. There might be a PSW that she could shadow but she was not offered any PSW work. Her PSW position was no longer available.

[18] The Claimant's application for EI benefits, completed on March 10, 2021, indicates that she is on a leave of absence. She wrote that she intended to return to her job at the LTCF. In an interview with a Service Canada agent on October 27, 2021, the Claimant repeated that she told her employer she needed to resign due to the COVID 19 restriction and her employer offered her a leave of absence from her job instead. She accepted the offer of the leave of absence.

[19] I accept the Claimant's testimony that she started a period of leave when she stopped working on December 31, 2020. The Claimant has been consistent in her application for EI benefits and in conversations with Service Canada agents that she and her manager agreed she would be on a leave of absence and would be returning to

work once her semester ended. The Claimant's testimony, given in a forthright and direct manner, under affirmation, and subject to my questions was also consistent with respect to her being on a leave of absence and able to return to work.

[20] I recognize that the Record of Employment (ROE) issued on January 18, 2021 indicates the reason for issuing was E – Quit/Return to School. But, the ROE is just one piece of evidence that can be used to determine if a claimant voluntarily left their employment. In this case, I am placing less weight on the ROE because it contradicts the Claimant's statements on her application for EI benefits, her statements to Service Canada agents, her statements in her request for reconsideration and in her appeal to the Tribunal, and her testimony at the hearing.

[21] The onus is on the Commission to show that the Claimant left her job voluntarily.[1]

[22] To determine whether the Claimant left her employment voluntarily the question to be asked is whether she had a choice to stay or leave.[2]

[23] I find that the Claimant did not voluntarily leave her job as she did not have a choice to stay or leave. I find it was a misunderstanding between the Claimant and her employer. She thought that her leave of absence had been approved. She stopped working on December 31, 2020. Her employer issued an ROE on January 18, 2021, that said Quit / Return to School. The employer was not aware that the Claimant was on a leave of absence. When she returned for work she was told that there was no work in her former job.

[24] The courts have said that a misunderstanding does not automatically mean the Claimant voluntarily left her employment as all the circumstances must be looked at to determine if the termination of employment was voluntary.[3]

[25] In analyzing all the circumstances I find the leaving was not voluntary. I find the Claimant did not take the initiative in severing her employment. She told her manager

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[1] *Green v. Canada (Attorney General),* 2012 FCA 313. This is how I refer to the courts' decisions that apply to this appeal
[2] *Canada (Attorney General) v. Peace*, 2004 FCA 56
[3] *Bédard v Canada (Attorney General)*, 2001 FCA 76.

she thought she had to resign. Her manager offered her a leave of absence instead. The Claimant and the manager agreed she would return to work once her semester ended.

[26] This is not a case of the Claimant refusing employment offered as an alternative to an anticipated loss of employment, because her manager agreed she would return to work once the leave of absence ended. This is not a case of the Claimant refusing to resume an employment, because when the Claimant notified her employer she was ready to return to the PSW job she was told that job was not available. This is not a case of the Claimant refusing an employment with a new owner, because the Claimant did try to return to her former PSW job with the new employer but was told that work was no longer available.

[27] So, because the Claimant had no job to return to after the agreed upon leave of absence, I find the Claimant had no choice whether to stay in or to leave her job. This means that the Claimant did not voluntarily leave her job.

[28] Having determined that the Claimant did not voluntarily leave her job, I do not need to determine if she had just cause for doing so.

## Analysis ~ Availability

[29] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections for two periods of time.[4] So, it says she has to meet the criteria of both sections to get benefits.

[30] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[5] The

[4] The Commission disentitled the Claimant due to her not being available for work from March 7, 2021 to April 30, 2021 and from September 7, 2021 onward.
[5] See section 50(8) of the *Employment Insurance Act* (EI Act).

*Employment Insurance Regulations* (EI Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[6] I will look at those criteria below.

[31] Second, the EI Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[7] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[8] I will look at those factors below.

[32] The Commission decided that the Claimant was disentitled from receiving benefits because she was attending studies full-time.

[33] In looking through the evidence in the appeal file, I did not see any requests from the Commission to the Claimant to prove she made reasonable and customary efforts to find a suitable job, or any claims from the Commission that if it did ask the Claimant, her proof was insufficient.

[34] I note that the Commission did not make any submissions on how the Claimant failed to prove to it that she was making reasonable and customary efforts. The Commission only summarized what the legislation says in regard to section 50(8) of the EI Act and section 9.001 of the EI Regulations.

[35] Based on the lack of evidence that the Commission asked the Claimant to prove her reasonable and customary efforts under section 50(8) of the EI Act, I find the Commission did not disentitle the Claimant under section 50(8) of the EI Act. Therefore, I do not need to consider that part of the law when reaching my decision on this issue.

[36] I will only consider whether the Claimant was capable and available for work under the section 18 of the EI Act.

[37] The Claimant was a student during the period she was disentitled from receiving benefits. The Federal Court of Appeal has said that claimants who are in school full-

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[6] See section 9.001 of the EI Regulations.
[7] See section 18(1)(a) of the EI Act.
[8] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

time are presumed to be unavailable for work.[9] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school full-time.

[38] I have to consider the presumption that claimants who are attending school full-time are unavailable for work.[10] I am going to start by looking at whether this presumption applies to the Claimant. Then, I will look at the law on availability.

## Presuming full-time students aren't available for work

[39] The presumption that students aren't available for work applies only to full-time students.

### – The Claimant was both a full-time and part-time student

[40] The Claimant testified she was a part-time student from September 7, 2021 to December 17, 2021. I see no evidence that shows otherwise. This means the presumption does not apply during this period of time.

[41] The Claimant testified that she was a full-time student from March 8, 2021 to April 30, 2021.[11] The Claimant said she returned to full-time studies on January 10, 2022, and was in full-time studies as of the date of the hearing. I see no evidence that shows otherwise. This means the presumption applies for these periods of time. But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[42] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working full-time while also in school.[12] Or, she can show that there are exceptional circumstances in her case.[13]

[43] The Claimant testified that she first applied for EI benefits in March 2021 when she learned from a fellow student about EI and that she could apply. She had been

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[9] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[10] This presumption is set out in *Canada (Attorney General) v. Gagnon*, 2005 FCA 321.
[11] March 8, 2021 is the first day of disentitlement for not proving availability.
[12] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[13] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

attending college full-time since January 2021. The Claimant said that since 2016 she has worked part-time while she was in high school and also in college. She also worked full-time during the summer breaks.

[44] The Claimant testified that she looked for work when she started college in January 2021. She applied for work as a residence assistant, in retail stores and she asked a former retail store employer if they had work for her. The Claimant returned to full-time work during the summer break from college. She also continued to work part-time with that former full-time summer employer from September 7, 2021 until that work ended on October 10, 2021.

[45] The Claimant returned to full-time studies on January 10, 2022. She continued to look for work and was successful getting a job in a LTCF because the restrictions were lifted. She now works as a casual part-time employee in a mix of shifts on Friday, Saturday and Sunday.

[46] The Commission says that to rebut the presumption, the Claimant has to show that she was actively searching for full-time work while taking courses.

[47] I do not agree with the Commission that the Claimant had to show she was available for full-time work while studying; there is no such requirement in the legislation. Her obligation was to show she was available for work consistent with her past work history.

[48] I find that the Claimant has rebutted the presumption that she was not available for work because she was a full-time student from March 8, 2021 to April 30, 2021 and from January 10, 2022 onward.

[49] The Claimant indicated on the training questionnaire that she completed on March 10, 2021 that she was not available for work and capable of working under the same or better conditions as she was before she started her course. At the hearing, the Claimant explained that she indicated she was not available under the same or better conditions because she though the question had to do with the type of work that she was performing at the LTCF. She answered no because she was not able to do PSW

work while the restriction of being in two healthcare facilities at the same time was in place. She indicated that she was looking for other employment while she was taking her course as there are no restrictions for her to work in any other employment.

[50] In my opinion, terms and conditions of employment are not the type or work but the hours, rate of pay and benefits associated with a job. The Claimant could not work part-time in healthcare but was able to work elsewhere part-time and had been looking for work in other types of employment. This evidence tells me the Claimant was available for work under the same terms and conditions as she previously worked.

[51] The Claimant returned to full-time college studies on January 7, 2022. She continued to look for work and was successful getting part-time employment in a LTCF in February 2022. She works a mix of shifts on the weekends. This is the same type and hours of part-time work that she was performing when she was attending college full-time from September 2020 to December 2020.

[52] As noted above, case law says the presumption is rebutted when a claimant can show she worked full-time while studying full-time or there are exceptional circumstances. The Claimant, has a six-year history of working part-time while studying full-time. She looked for work in the areas where she had experience, that is in retail and healthcare. She was successful in getting full-time work during the summer months. She returned to part-time work in September 2021 and February 2022. Considering this evidence, I find that the Claimant has rebutted the presumption that she is not available for work due to attending college full-time.

[53] The Federal Court of Appeal hasn’t yet told us how the presumption and the sections of the law dealing with availability relate to each other.

[54] Rebutting the presumption means only that the Claimant isn’t presumed to be unavailable. I still have to look at the section of the law that applies in this case and decide whether the Claimant is actually available.

## Capable of and available for work

[55] As noted above, I only need to consider whether the Claimant was capable of and available for work under paragraph 18(1)(a) of the EI Act.

[56] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[14]

a) She wanted to go back to work as soon as a suitable job was available.

b) She has made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[57] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[15]

– **Wanting to go back to work**

[58] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available. The Claimant testified that she has found that success does not come if you don't do something to get success. She said that she is independent and does not want to owe money. She needs to work to pay her bills. The Claimant has worked for the past six years: part-time while she was in high school and attending college and full-time during the summer breaks. She is currently working. This evidence tells me the Claimant wanted to go back to work as soon as a suitable job was offered.

– **Making efforts to find a suitable job**

[59] The Claimant has made enough effort to find a suitable job.

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[14] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.
[15] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[60] There is a list of job search activities to look at when deciding availability under a different section of the law.[16] This other section does not apply in the Claimant's appeal. But, I am choosing look at that list for guidance to help me decide whether the Claimant made efforts to find a suitable job.[17]

[61] There are nine job search activities in the list of job search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.[18]

[62] The Claimant's efforts to find a new job included signing up for the job bank to get emails about jobs, applying for jobs through online websites like InDeed, looking at the college's online job notices, applying for jobs at the college and with former employers, notifying her former LTCF employer that she was able to return to her job, dropping off her resume to potential employers, applying for jobs at fast food restaurants, retail outlets and talking to fellow students, friends and family about work opportunities. She looked for work while she was attending college and also while on breaks. She was successful getting full-time work for the summer 2021 break, and part-time work in September 2021 and again in February 2022.

[63] I am satisfied that the Claimant's job search efforts expressed her desire to return to the labour market as soon as a suitable job was offered.

– **Unduly limiting chances of going back to work**

[64] The Claimant has not set personal conditions that might have unduly limited her chances of going back to work.

[65] The Claimant testified that she has access to transportation to go to work and has a driver's license, she is willing to commute to go to work. She looked for work that

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[16] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[17] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.
[18] Section 9.001 of the EI Regulations.

was consistent with her experience in retail and in healthcare. She expected to earn a bit above minimum wage which is what she was making in her PSW job. There are no jobs that she could not do due to moral convictions or religious beliefs. She is willing to accept a job that might require on the job training.

[66] Although I am not bound to follow a Canada Umpire Benefits (CUB) decision, I consider the reasoning in CUB 52365 to be persuasive. In that case the claimant left her job to take a course that left her with the ability to work from 6:00 to 10:00 each day, six days of the week for a total of 24 hours. The Umpire considered that it was significant that the claimant's current availability while in school was not less than it had been when the claimant had been working. The Umpire stated that the facts supported that the claimant would be available for work as much as she was previously where her employment consisted of 20 hours. He determined the claimant had proven she was available for work.

[67] The Claimant, in this case, testified that the clinical and lab days required in-person attendance. She was also expected to attend her other classes in person. The Claimant has indicated that she is able to accept employment that does not interfere with her full-time college schedule. That intention likely excludes employment opportunities that otherwise might be available. Regardless of this, the Claimant remained available to accept employment with the same or greater number of work hours as her prior employment to coordinate with her course attendance requirements which were similar to those that existed prior to her loss of employment.

[68] The evidence is that the Claimant returned to part-time employment in September 2021 when she returned to college part-time and again in February 2022 when she was engaged in full-time studies. The part-time employment was on the weekends, which is the same time that she worked when she was required to attend classes both as a full-time and part-time student. These facts support that the Claimant was as available for work as she was previously while attending college. As a result, I find that the Claimant's studies did not and do not limit her chances of going back to work during those periods.

– **So, was the Claimant capable of and available for work?**

[69] Based on my findings on the three factors, I find that the Claimant has shown that she was capable of and available for work but unable to find a suitable job.

## Conclusion

[70] With respect to the issue of voluntarily leaving her job, the appeal is allowed. The Commission has failed to meet its burden to show the Claimant had a choice to stay in or to leave her job.

[71] The Claimant has shown that she was available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving benefits. So, the Claimant may be entitled to benefits.

[72] This means that the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section